IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DONALD LEE SOWELL,
Petitioner.

No. 2 CA-CR 2015-0087-PR
Filed April 3, 2015

Petition for Review from the Superior Court in Maricopa County
No. CR2001011499
The Honorable Teresa Sanders, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

The Nolan Law Firm, P.L.L.C., Mesa
By Cari McConeghy Nolan
Counsel for Petitioner

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Chief Judge Eckerstrom and Presiding Judge Miller concurred.

E S P I N O S A, Judge:

¶1   Petitioner Donald Sowell seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Sowell has not sustained his burden of establishing such abuse here.

¶2   After a jury trial, Sowell was convicted of possession of dangerous drugs and possession of drug paraphernalia. The trial court imposed concurrent, enhanced, aggravated prison sentences, the longer of which was fourteen years. Sowell's sentences were vacated on appeal, *State v. Sowell*, No. 1 CA-CR 02-0254 (memorandum decision filed Feb. 25, 2003), and he was resentenced to concurrent terms, the longer of which was twelve years' imprisonment. Those sentences were affirmed on appeal. *State v. Sowell*, No. 1 CA-CR 03-0473 (memorandum decision filed Apr. 20, 2004).

¶3   Sowell thereafter initiated a proceeding for post-conviction relief, and the trial court dismissed the petition. Sowell's petition for review was denied. He filed a second notice of post-conviction relief, which the trial court also dismissed, and Sowell's petition for review of that ruling was denied. Sowell then filed a "Motion to Allow Arizona Clemency Board to Consolidate Consecutive Case." In that motion he asked the trial court to allow the clemency board to consolidate this case with another and argued his sentences were improper. The court deemed the motion one for post-conviction relief, and denied it.

¶4   In September 2013, Sowell once again sought post-conviction relief, this time contending he had received ineffective assistance of counsel in several regards, including that a plea offer had not been communicated to him; his right to counsel had been violated; and his sentence was unconstitutional. He also asserted that "his failure to timely file a notice of post-conviction relief alleging th[ese] claim[s] within the originally prescribed time period was without fault on his part" and that his claims were of sufficient constitutional magnitude that they should not be precluded. The trial court summarily dismissed the proceeding.

¶5   On review, Sowell repeats his claims and contends the trial court erred in rejecting them. In a successive and untimely proceeding such as this one, however, a defendant may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). *See* Ariz. R. Crim. P. 32.2(b), 32.4(a). Sowell's claims of trial and sentencing error and ineffective assistance of counsel are all claims pursuant to Rule 32.1(a), which cannot be raised in an untimely, successive petition.

¶6   Sowell seeks to avoid the rule of preclusion by asserting a claim pursuant to Rule 32.1(f), that he was without fault in the untimely raising of his claims. As the trial court pointed out, however, as a non-pleading defendant, Sowell is not entitled to relief under that rule. Rule 32.1(f) provides that a defendant may seek leave to file a delayed "of-right" notice of post-conviction relief. And Rule 32.1 defines an "of-right proceeding" solely to encompass a first proceeding for a "person who pled guilty or no contest, admitted a probation violation, or whose probation was automatically violated based upon a plea of guilty or no contest." Had the supreme court wished to provide non-pleading defendants with the means to seek leave to file a delayed notice of post-conviction relief in order to assert a first claim of ineffective assistance of trial or appellate counsel, the court could have so provided in Rule 32.1(f). It did not include such a provision, and we can neither construe the rule to include words that are not there nor rewrite the rule. *See Potter v. Vanderpool*, 225 Ariz. 495, ¶ 13, 240 P.3d 1257, 1262 (App. 2010).

¶7   Sowell also maintains his claims are of sufficient constitutional magnitude to avoid preclusion. But that issue is "immaterial" to "the failure to file a timely notice pursuant to Rule 32.4(a) for claims outside of Rule 32.1(d) through (h)." *State v. Lopez*, 234 Ariz. 513, ¶¶ 8, 10, 323 P.3d 1164, 1166 (App. 2014). Thus, his claims are barred as untimely, even if we were to accept that they are of sufficient constitutional magnitude to avoid preclusion.

¶8   Sowell also contends his claim relating to the plea offer is not untimely because he did not learn of it "until years later." Although Sowell is unclear as to exactly when he learned of the offer, the letter from counsel addressing the plea, which he included with his petition for post-conviction relief, is dated in 2004. Sowell has provided no explanation for his failure to raise this issue in the nine years between the date of that letter and the filing of his most recent notice of post-conviction relief. Furthermore, although it is unclear if he is referring to the same plea offer in the current proceeding, Sowell raised a claim that counsel had not communicated a plea offer in his first Rule 32 proceeding, and the trial court rejected it. *See* Ariz. R. Crim. P. 32.2(a)(2); *Swoopes*, 216 Ariz. 390, ¶¶ 23, 25, 166 P.3d at 952-53.

¶9   Accordingly, although we grant the petition for review, relief is denied.